Supreme Court, U.S.
FILED

Nº. 06-308 JUN 26 2006

OFFICE OF THE CLERK

In The
Supreme Court of the United States

TROY R. STUART,
Petitioner,
v.
JULIUS WILSON, WARDEN,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

* Nathan A. Ray
ATTORNEY AT LAW
137 South Main Street
Suite 201, Delaware Building
Akron, OH 44308

(330) 253-7171

* *Counsel of Record*
Counsel for Petitioner

August, 2006

LEGAL ADVANTAGE • 432 Walnut Street • Cincinnati, OH 45202
(800) 581-2252

APPENDIX

NORTHERN DISTRICT OF OHIO FILING:

Report and Recommendation
of Magistrate Judge,
filed 03/12/04 ..... D1- D39

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

FILED
March 12, 2004
Northern District
of Ohio,
Clerk

TROY R. STUART,
Petitioner,

vs.

JULIUS WILSON, WARDEN,
Respondent.

Case No. 5:03CV469

JUDGE JOHN R. ADAMS
Magistrate Judge
George J. Limbert

REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE

On March 17, 2003, Troy R. Stuart, (hereinafter "Petitioner"), by and through counsel, filed a petition for writ of habeas corpus in this Court pursuant to 28 U.S.C. § 2254. Electronic Case Filing (hereinafter "ECF") Dkt. # 1. For the following reasons, the undersigned recommends that this Court DENY Stuart's petition for writ of habeas corpus.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. STATE PROCEEDINGS

On October 14, 1999, the Grand Jury for Summit County, Ohio returned a three-count indictment charging Petitioner with two counts of rape by force of a victim under thirteen years of age, in violation of Ohio Revised Code § 2907.02(A)(1)(B), and one count of gross sexual imposition of a victim under thirteen years of age, in violation of Ohio Revised Code § 2907.05(A)(4). Exhibit 1, Indictment.

On February 4,2000, the State of Ohio filed a notice of its intention to use the victim's out-of-court statement at trial pursuant to Rule 807 of the Ohio Rules of Evidence. Exhibit 5. In response, on February 10, 2000, Petitioner filed a motion to strike the "State's Motion for [Evidence Rule] 807 Hearing." Exhibit 3, Motion. On February 17, 2000, the trial court conducted an evidentiary hearing pursuant to Rules 803 and 807 of the Ohio Rules of Evidence. Exhibit 4, Hearing Transcript. At this hearing, the trial court and prosecution examined the victim and several other witnesses regarding the rapes. *Id.* Furthermore, Petitioner crossexamined the victim. *Id* at 17. On March 21, 2000, the trial Court ruled that the victim was competent to testify, but also that the victim was unavailable to testify pursuant to Rule 807(2) of the Ohio Rules of Evidence with regard to any substantive matters and issues before the trial court.

Accordingly, the trial court determined that the victim's out-of-court statements would be admissible at trial. Exhibit 8, Order. On March 24, 2000, the trial court denied reconsideration of this order. ECF Dkt. #25. Finally, on March 24, 2000, Petitioner filed a motion *in limine* seeking to preclude the victim's statement from being admitted into evidence. *Id.* The record reflects no ruling on this motion. Id

A jury trial commenced on March 27, 2000. Exhibit 9, Trial Transcript (Volume 1 of 3); Exhibit 10, Trial Transcript (Volume 2 of 3); Exhibit 11, Trial,Transcript (Volume 3 of 3). On March 31, 2000, the jury returned a guilty verdict on all three counts of the indictment, including all specifications. Exhibit 12, Guilty Verdicts. On April 3, 2000, the trial court issued its judgment entry of conviction. Exhibit 13, Judgment Entry.

On May 18, 2000, the trial court sentenced Petitioner to the following: (a) on Count One, rape, life imprisonment; (b) on Count Two, rape, life imprisonment; (c) on Count Three, gross sexual imposition, one year imprisonment; (d) counts to be served concurrently; (e) Petitioner was adjudicated to be a sexually oriented offender.[1] Exhibit 14,

---

[1]On June 1,2000, the trial court issued a *Nunc Pro Tunc* sentencing order, in which it changed paragraph 4 of the original sentencing order dated May 18, 2000. However, the *Nunc Pro Tunc* order did not change the terms of imprisonment or the overall sentence. Exhibit 15, *Nunc Pro Tunc* Sentencing Order.

Judgment Entry (Sentencing); Exhibit 27, Sentencing Hearing Transcript.

On June 2, 2000, Petitioner, through counsel, filed a timely notice of appeal with the Ohio Court of Appeals for the Ninth Judicial District (hereinafter "Ninth District Court of Appeals"). Exhibit 16, Notice of Appeal. On October 18, 2000, Petitioner filed a brief and presented the following seven assignments of error:

1. EACH OF THE GUILTY VERDICTS IN THE INSTANT CASE WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AT TRIAL HEREIN, AND ACCORDINGLY IN VIOLATION OF DEFENDANT'S RIGHTS AS GUARANTEED TO HIM BY THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION.
2. DEFENDANT'S CONVICTIONS HEREIN ARE BASED ON INSUFFICIENT EVIDENCE AND SHOULD THEREFORE BE REVERSED, AND FINAL JUDGMENT ENTERED FOR DEFENDANT. THESE CONVICTIONS, NOT SUPPORTED BY SUFFICIENT EVIDENCE, ARE IN VIOLATION OF DEFENDANT'S RIGHT TO DUE PROCESS AS GUARANTEED TO HIM BY THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION.
3. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY DENYING

DEFENDANT-APPELLANT'S PRETRIAL MOTION AND REQUEST TO EXCLUDE OUT-OF-COURT STATEMENTS BY THE ALLEGED VICTIM FROM BEING INTRODUCED THROUGH THE TESTIMONY OF OTHER WITNESSES, IN VIOLATION OF EVID. R. 807 AND OF EVID. R. 802, AND BY ALLOWING SUCH HEARSAY TESTIMONY TO BE INTRODUCED BY THE STATE, OVER OBJECTION, AT TRIAL, IN VIOLATION OF DEFENDANT'S RIGHTS AS GUARANTEED TO HIM BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION; THE TRIAL COURT COMMITTED FURTHER PREJUDICIAL ERROR BY FAILING TO RE-INTERVIEW THE ALLEGED VICTIM ON THE RECORD IMMEDIATELY PRIOR TO, OR DURING TRIAL, TO ESTABLISH WHETHER THE ALLEGED VICTIM WAS THEN ABLE TO TESTIFY CONCERNING THE ALLEGATIONS.

4. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY ALLOWING, OVER OBJECTION, STATE'S EXHIBIT 3, A HANDWRITING SAMPLE OF DEFENDANT, INTO EVIDENCE.

5. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY ALLOWING, OVER OBJECTION, STATE'S EXHIBIT 4 INTO EVIDENCE, IN VIOLATION OF

DEFENDANT'S RIGHTS AS GUARANTEED TO HIM BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION.

6. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY ALLOWING A STATE'S WITNESS, LORIN STUART, TO TESTIFY, OVER OBJECTION, CONCERNING THE CONTENTS OF A LETTER DEFENDANT HAD ALLEGEDLY WRITTEN, WHICH LETTER COULD NOT BE PRODUCED BY THE STATE, IN VIOLATION OF DEFENDANT-APPELLANT'S RIGHTS AS GUARANTEED TO HIM BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION.

7. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY DENYING DEFENDANT'S REQUEST TO CALL DYLAN STUART, A MINOR CHILD, AS A DEFENSE WITNESS, IN VIOLATION OF DEFENDANT'S RIGHTS AS GUARANTEED TO HIM BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION.

Exhibit 17, Appellant's Brief. On April 4, 2001, the Ninth District issued an opinion addressing and overruling each of

Petitioner's assignments of error presented on direct appeal. (Exhibit 19, Opinion).

On May 18, 2001, Petitioner, through counsel, filed a timely notice of appeal with the Ohio Supreme Court. Exhibit 20, Notice of Appeal. In his memorandum in support of jurisdiction, Petitioner raised the following five propositions of law:

> **PROPOSITION OF LAW NO. I**: A DEFENDANT'S RIGHTS ARE VIOLATED WHEN A STATE'S WITNESS IS PERMITTED TO TESTIFY CONCERNING HIS RECOLLECTION OF THE CONTENTS OF A LETTER ALLEGEDLY WRITTEN BY THE DEFENDANT WHEN THE ALLEGED LETTER IS NEVER PRODUCED BY THE STATE AT TRIAL, WHEN THERE IS NO INDICATION THAT THE INFLAMMATORY STATEMENTS ALLEGEDL Y CONTAINED IN THE LETTER HAD ANY CONNECTION WITH THE SEXUAL ABUSE ALLEGEDLY COMMITTED AGAINST THE VICTIM, AND WHEN THERE IS NO DEFINITIVE PROOF THAT THE DEFENDANT WROTE THE LETTER OR THAT THE LETTER EVER, IN FACT, EXISTED.
>
> **PROPOSITION OF LAW NO. II**: A DEFENDANT'S CONVICTIONS FOR RAPE AND GROSS SEXUAL IMPOSITION BASED UPON EVIDENCE OF CERTAIN OUT-OF-COURT STATEMENTS ALLEGEDLY MADE BY THE CHILD VICTIM AND INTRODUCED AT TRIAL

THROUGH THE TESTIMONY OF OTHER WITNESSES, IN VIOLATION OF EVIDENCE RULES 802 AND 807, ARE VIOLATIVE OF THE DEFENDANT'S CONSTITUTIONAL GUARANTEES OF DUE PROCESS AND THE RIGHT TO CONFRONTATION AS SET FORTH IN THE UNITED STATES CONSTITUTION AND THE OHIO CONSTITUTION.

PROPOSITION OF LAW NO. III: A TRIAL COURT COMMITS PREJUDICIAL ERROR BY ALLOWING INTO EVIDENCE A STICK-FIGURE DRAWING OF A SEXUAL NATURE, WHEN THERE IS NO EVIDENCE THAT THE DRA WING WAS MADE BY OR IN ANY WAY CONNECTED WITH THE ACCUSED.

PROPOSITION OF LAW NO. IV: APPELLANT'S CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND, ACCORDINGLY, IN VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHT TO DUE PROCESS.

PROPOSITION OF LAW NO. V: APPELLANT'S CONVICTION WAS BASED UPON INSUFFICIENT EVIDENCE AND IS IN VIOLATION OF APPELLANT'S RIGHT TO DUE PROCESS AS GUARANTEED TO HIM UNDER THE UNITED STATES CONSTITUTION AND THE OHIO CONSTITUTION .

Exhibit 21, Memorandum in Support of Jurisdiction, at v-vi. On June 7, 2001, the State of Ohio filed a memorandum in response to jurisdiction. Exhibit 22, Response Memorandum. On July 25,2001, the Ohio Supreme Court denied Petitioner leave to appeal and dismissed Petitioner's appeal as not involving any substantial constitutional question. Exhibit 23, Order.

On October 23,2001, Petitioner, through counsel, filed a Petition for Writ of Certiorari in the United States Supreme Court and raised the following question presented for review:

> WHETHER, BEFORE A CHILD'S OUT-OF-COURT STATEMENTS ARE ADMISSIBLE, THE CONFRONTATION CLAUSE REQUIRES THE PROSECUTION TO SHOW THAT THE CHILD WITNESS IS UNAVAILABLE FOR TRIAL, AND IF SO, WHAT THAT SHOWING REQUIRES?

Exhibit 25, Petition for Writ of Certiorari. On March 18,2002, the United States Supreme Court denied the Petition for Writ of Certiorari. Exhibit 26, Order Denying Certiorari.

B. FEDERAL HABEAS CORPUS

On March 17, 2003, Petitioner, through counsel, filed the instant petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, stating three claims for relief, to-wit, grounds three, four, and five. ECF Dkt. #1. On July 9,2003, Warden

Julius Wilson (hereinafter "Respondent" filed his answer/return of writ and moved this Court to dismiss the instant petition. ECF Dkt. # 11. Subsequently, Petitioner filed a motion for leave to file a corrected memorandum in support of his petition for writ of habeas corpus. ECF Dkt. #20. On September 2,2003, the undersigned granted Petitioner's motion for leave. ECF DkL#21. On September 2,2003, Petitioner filed his corrected memorandum in support of his petition for writ of habeas corpus, in which he added additional claims for relief, namely, grounds one and two. ECF Dkt. #22. Overall, Petitioner has set forth the following five grounds for relief:

> **GROUND FOR RELIEF NO. 1**: PETITIONER STUART'S UNITED STATES CONSTITUTIONAL RIGHTS WERE VIOLATED WHEN A STATE'S WITNESS WAS PERMITTED TO TESTIFY CONCERNING HIS RECOLLECTION OF THE CONTENTS OF A LETTER ALLEGEDLY WRITTEN BY THE PETITIONER WHEN THE ALLEGED LETTER WAS NEVER PRODUCED BY THE STATE AT TRIAL, WHEN THERE WAS NO INDICATION THAT THE INFLAMMATORY STATEMENTS ALLEGEDLY CONTAINED IN THE LETTER HAD ANY CONNECTION WITH THE SEXUAL ABUSE ALLEGEDLY COMMITTED AGAINST THE VICTIM IN THIS CASE, AND WHEN THERE WAS NO DEFINITIVE PROOF THAT PETITIONER WROTE

THE LETTER OR THAT THE LETTER EVER, IN FACT, EXISTED.

GROUND FOR RELIEF NO. 2: PETITIONER STUART'S CONVICTIONS FOR RAPE AND GROSS SEXUAL IMPOSITION, BASED UPON EVIDENCE OF CERTAIN OUT-OF-COURT STATEMENTS ALLEGEDLY MADE BY THE CHILD VICTIM AND INTI ODUCED AT TRIAL THROUGH THE TESTIMONY OF OTHER WITNESSES, ARE VIOLATIVE OF THE PETITIONER'S CONSTITUTIONAL GUARANTEES OF DUE PROCESS AND THE RIGHT TO CONFRONTATION AS SET FORTH IN THE UNITED STATES CONSTITUTION.

GROUND FOR RELIEF NO. 3: A TRIAL COURT COMMITS PREJUDICIAL ERROR BY ALLOWING INTO EVIDENCE A STICK-FIGURE DRAWING OF A SEXUAL NATURE, WHEN THERE IS NO EVIDENCE THAT THE DRA WING WAS MADE BY OR IN ANY WAY CONNECTED WITH THE ACCUSED.

GROUND FOR RELIEF NO. 4: PETITIONER STUART'S CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND, ACCORDINGLY, IN VIOLATION OF PETITIONER'S UNITED STATES CONSTITUTIONAL RIGHTS.

GROUND FOR RELIEF NO. 5: PETITIONER STUART'S CONVICTION WAS BASED UPON

INSUFFICIENT EVIDENCE AND IS IN VIOLATION OF PETITIONER'S RIGHT TO DUE PROCESS AS GUARANTEED TO HIM UNDER THE UNITED STATES CONSTITUTION.

ECF Dkt. #22, Corrected Memorandum in Support, at 7-13. On October 20,2003, Respondent filed his supplemental answer/return of writ. ECF Dkt. #25. On December 3,2003, Petitioner filed his traverse to Respondent's answer/return of writ. ECF Dkt. #28. Finally, on December 15, 2003, Respondent filed his reply brief to Petitioner's traverse. ECF Dkt. #29.

II. STANDARD OF REVIEW

A. PROCEDURAL BARRIERS TO REVIEW

Petitioner brought the instant petition for writ of habeas corpus pursuantto 28 U.S.L § 2254, whereby a state prisoner is entitled to relief ifhe is held in custody in violation of the U.S. Constitution or laws or treaties ofthe United States. 28 U.S.L § 2254(d). However, a petitioner must overcome several procedural barriers before a court will review the merits of the petition for writ of habeas corpus. As Justice O'Connor noted in *Daniels v. United States, infra,* "Procedural barriers, such as statutes of limitations[2] and rules

[2] As a threshold matter, the AEDPA contains a one-year statute of limitations that applies to petitions filed pursuant to

concerning procedural default and exhaustion of remedies, operate to limit access to review on the merits of a constitutional claim." *Daniels v. United States*, 532 U.S. 374, 381 (2001); *see also United States v. Olano*, 507 U.S. 725, 731 (1993).

First, as a general rule, a state prisoner must exhaust all possible state remedies or have no remaining state remedies before a federal court will review a petition for a writ of habeas corpus. 28 U.S.C. § 2254(b)and (c); *see also Baldwin v. Reese*, 541 U.S. ___ (March 2, 2004). The exhaustion requirement is satisfied "once the federal claim has been fairly presented to the state courts." *Franklin v. Rose*, 811 F.2d 322,325 (6th Cir. 1987). To exhaust a claim, a petitioner must present it "to the state courts under the same theory in which it is later presented in federal court." *Wong v.*

---

28 U.S.C. § 2254. The one-year statute of limitations is found in 28 U.S.C. § 2244(d), and for purposes of this inquiry, begins to run on the date on which the judgment became final by the conclusion of direct review or the expiration of time for seeking such review. 28 U.S.C. § 2244(d)(1)(A). Here, the United States Supreme Court denied Petitioner's Petition for the Writ of Certiorari on March 18, 2002, thereby concluding the direct review of Petitioner's claims. Thus, Petitioner's conviction and sentence became final on March 18,2002, and he had until March 18,2003 in which to file his petition for writ of habeas corpus. Petitioner filed the instant petition on March 17,2003, and as such, the Court finds that the petition is timely filed under Section 2244.

Money, 142 F.3d 313, 322 (6th Cir. 1998); *see also McMeans v. Brigano*, 228 F.3d 674, 681 (6th Cir. 2000). General allegations ofthe denial of rights to a "fair trial" and "due process" do not "fairly present" claims that specific constitutional rights were violated. *Id* (citing *Petrucelli v. Coombe*, 735 F.2d 684, 688-89 (2d Cir. 1984)).

Unless an exception applies, a petition must be dismissed for lack of exhaustion if it contains at least one issue which was not presented to the state courts so long as a remedy is still available for the petitioner to pursue in the state courts. *Rose v. Lundy*, 455 U.S. 509, 518-20, 71 L. Ed. 2d 379, 102 S. Ct. 1198 (1982). The Supreme Court has held that "the petitioner has the burden ... of showing that other available remedies have been exhausted or that circumstances of peculiar urgency exist." *Darr v. Burford*, 339 U.S. 200, 218-19 (1950), *overruled in part on other grounds, Fay v. Noia*, 372 U.S. 391 (1963). A petitioner will not be allowed to present claims never before presented in the state courts unless he can show cause to excuse his failure to present the claims in the state courts and actual prejudice to his defense at trial or on appeal, or that he is actually innocent of the crime for which he was convicted. *Coleman v. Thompson*, 501 U.S. 722, 748 (1991).

Moreover, the procedural default doctrine also serves to bar review of federal claims that a state court has declined to address because of the petitioner's noncompliance with a state procedural requirement. *Wainwright v. Sykes*, 433 U.S.

72, 87 (1977). In these cases, "the state judgment rests on independent and adequate state procedural grounds." *Coleman v. Thompson*, 501 U.S. 722, 730 (1991). However, when the last explained state court decision rests upon procedural default as an "alternative ground," a federal district court is not required to reach the merits ofa habeas petition. *McBee v. Abramajtys*, 929 F.2d 264, 265 (6th Cir. 1991). In determining whether a state court has addressed the merits of a petitioner's claim, federal courts must rely upon the presumption that there is no independent and adequate state grounds for a state court decision absent a clear statement to the contrary. *See Coleman*, 501 U.S. at 735. Applying this presumption, the Sixth Circuit Court of Appeals established a four-pronged analysis to determine whether a claim has been procedurally defaulted. *See Maupin v. Smith*, 785 F.2d 135 (6th Cir. 1986). Under the *Maupin* test, a reviewing court must decide:

(1) whether the petitioner failed to comply with an applicable state procedural rule;

(2) whether the state courts actually enforced the state procedural sanction;

(3) whether the state procedural bar is an "adequate and independent" state ground on which the state can foreclose federal review; and

(4) if the above are met, whether the petitioner has demonstrated "cause" and "prejudice."

Id at 138.

As set forth in the *Maupin* test, a claim that is procedurally defaulted in state court will not be reviewable in federal habeas corpus unless the petitioner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claim will result in a fundamental miscarriage of justice. *Coleman v. Thompson*, 501 U.S. 722, 751 (1991). "Cause" is a legitimate excuse for the default, and "prejudice" is actual harm resulting from the alleged constitutional violation. *See Magby v. Wawrzaszek*, 741 F.2d 240, 244 (9th Cir. 1984), *cert. denied*, 490 U.S. 1068 (1985). If a petitioner fails to show cause for his procedural default, the reviewing court need not address the issue of prejudice. *See Smith v. Murray*, 477 U.S. 527 (1986).

The above standards are applicable to the review of Petitioner's claims.

B. STANDARD OF REVIEW FOR THE MERITS OF A CLAIM

The Antiterrorism and Effective Death Penalty Act ("AEDPA") of 1996 governs this Court's review of the instant case because Petitioner filed his petition for habeas

corpus relief on November 17, 2002, well after the Act's effective date of April 26, 1996. *See Harpster v. Ohio*, 128 F.3d 322, 326 (6th Cir. 1997), *cert. denied*, 522 U.S. 1112 (1998). If a habeas corpus petitioner overcomes the procedural obstacles as described in the foregoing section, the AEDPA sets forth the standard of review for the merits of a petition for the writ of habeas corpus. The AEDPA provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable *application of*, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d) (emphasis added). After the AEDPA took effect, courts applied varying interpretations ofthe standards set forth in 28 U.S.C. § 2254(d). In *Williams v.*

Taylor, infra, the Supreme Court clarified the language of 28 U.S.C. § 2254(d) and stated:

> Under the "contrary to" clause, a federal habeas court may grant the writ ifthe state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ ifthe state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

Williams v. Taylor, 529 U.S. 362, 412-13 (2000). The Supreme Court also noted that a "state-court opinion can also engender the 'unreasonable application' of Supreme Court precedent if it 'either unreasonably extends or unreasonably refuses to extend a legal principle from Supreme Court precedent to a new context.'" *Williams*, 529 U.S. at 409. Furthermore, the Supreme Court declared that "a federal habeas court making the 'unreasonable application' inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable." *Id.* Elaborating on the term "objectively unreasonable," the Court stated that "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly

established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id.*

Finally, a reviewing federal court is bound by the presumption of correctness, under which the federal court is obligated to "accept a state court's interpretation of the state's statutes and rules of practice." *Hutchinson v. Marshall*, 744 F.2d 44, 46 (6th Cir. 1984), *cert. denied*, 469 U.S. 1221 (1985); *see also Duffel v. Dutton*, 785 F.2d 131, 133 (6th Cir. 1986). The presumption of correctness is set forth in 28 U.S.C. § 2254(e), which provides:

> (e) (1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct.

28 U .S.C. § 2254(e). The presumption of correctness applies to basic primary facts, and not to mixed questions of law and fact. *Levine v. Torvik*, 986 F.2d 1506, 1514 (6th Cir.), *cert. denied*, 509 U.S. 907 (1993). The presumption also applies to "implicit findings of fact, logically deduced because of the trial court's ability to adjudge the witnesses' demeanor and credibility." *McQueen v. Scroggy*, 99 F.3d 1302, 1310 (6th Cir. 1996), *cert. denied*, 520 U.S. 1257 (1997). Furthermore, a reviewing federal court is not free to ignore the pronouncement ofa state appellate court on matters of law. *See Central States, Southeast & Southwest Areas Pension*

Fund v. Howell, 227 F.3d 672, 676, n.4 (6th Cir. 2000). Petitioner has the burden of rebutting the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(l).

III. DISCUSSION

Based upon the applicable standards of review, the undersigned recommends that the Court deny the instant petition for writ of habeas corpus because several of the claims contained in the first, second, and third grounds for relief are not cognizable on federal habeas review, and because Petitioner has procedurally defaulted the remaining claims contained in his first, second, and third grounds for relief, and because the fourth ground for relief is not cognizable on federal habeas review, and also because the fifth ground for relief is without merit.

A. PETITIONER'S FIRST GROUND FOR RELIEF

In his first ground for relief, Petitioner alleges that the state trial court erred by allowing Lorin Stuart, a witness for the State of Ohio, to testify as to his recollection of the contents of a letter written by the Petitioner. At trial, Lorin Stuart testified that he found a letter in Petitioner's bedroom and that the letter was in Petitioner's handwriting. Trial

Transcript, Exhibit 10, at 242- 245. The letter was apparently lost, and Lorin Stuart testified that the letter stated:

> To whom it may concern, but I have monsters too. Since I was three or four, until I was ten or eleven, I have been preyed upon by family members, family friends, including a sister. Everybody thinks that I'm gay. I am not gay. Because of what men have done to me all of you wonder why I don't have a girlfriend, I'm scared. Women are scary for what they have done to me. So I prey upon kids because they don't hurt me. All of you wondered why I don't have a girlfriend. I'm afraid that if we got serious, we would have kids, and I would prey upon them, too.

Id. at 244-45.

In his supporting memorandum, Petitioner argues that trial court erred in admitting the testimony of Lorin Stuart as to the contents of the letter because the State of Ohio failed to present any definitive proof to show that the letter even existed. ECF Dkt. #22, at 8. Next, Petitioner argues that the testimony was inadmissible hearsay. *Id.* Finally, Petitioner argues that the probative value of the testimony regarding the contents of the letter is far outweighed by the unfair prejudice resulting from the admission of said testimony. *Id.*

Respondent argues that Petitioner's claims under his first ground for relief are not cognizable on federal habeas review to the extent that they rest on errors of the application

of the Ohio Rules of Evidence. "Errors in application of state law, especially with regard to the admissibility of evidence, are usually not cognizable in federal habeas corpus." Walker v. Engle, 703 F.2d 959, 962 (6th Cir.), *cert. denied*, 464 U.S. 962 (1983); *see also Coleman v. Mitchell*, 244 F.3d 533, 542 (6th Cir. 2001). "It is not the province ofa federal habeas court to re-examine state-court determinations of state-law questions." *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). However, when an evidentiary ruling is so egregious that it results in a denial of fundamental fairness, it may violate due process and thus warrant habeas relief. *Coleman*, 244 F.3d at 542; *Seymour v. Walker*, 224 F.3d 542, 552 (6th Cir. 2000).

Based on the foregoing, the undersigned finds that the three claims contained in the first ground for relief are not cognizable on federal habeas review. Indeed, Petitioner's contentions that the state courts misapplied the Ohio Rules of Evidence challenges the state courts' application of state law. Such challenges are not cognizable in a federal habeas corpus proceeding. Thus, the undersigned recommends that this Court overrule Petitioner's first ground for relief to the extent that Petitioner challenges the state courts' application of state law.

Moreover, in his traverse, Petitioner argues for the first time that the admission of the testimony regarding the contents of the letter was fundamentally unfair, in violation of Petitioner's federal due process rights. ECF Dkt. #28, at 5-7. Petitioner claims that there was no physical evidence of any

rape or gross sexual imposition, and the admission of the contents ofthe letter was so grossly prejudicial that it fatally infected the trial.

As an initial matter, the Court notes that Petitioner did not raise this claim in his original petition or amended petition for the writ of habeas corpus, or raise it in any state proceeding. Instead, Petitioner raised this issue for the first time in his traverse. ECF Dkt. #28, at 5. Such action is disfavored. *Taylor v. Mitchell*, 296 F. Supp; 2d 784, 798 (N.D. Ohio 2003). In general a traverse is not the proper pleading in which to raise new issues because it does not adequately notify the state of the claim or permit the state an opportunity to oppose it. *Id.* (citing *Cacoperdo v. Demosthenes*, 37 F.3d 504, 507 (9th Cir. 1994); *Jack v. Randall*, No. C-2-99-947, *unreported*, 2000 WL 1456992, at * 7 (S.D. Ohio June 20, 2000) (prohibiting habeas petitioner from asserting new claim in traverse to which respondent had no opportunity to respond)). Because, in this case, Respondent was afforded the opportunity to respond to this claim in the reply to Petitioner's traverse (ECF Dkt. #29), however, it is not inherently prejudicial to Respondent for this Court to review this claim.

With this in mind, Respondent concedes that this argument is cognizable on federal habeas review because it implicates federal due process. However, Respondent argues that Petitioner has waived this claim because Petitioner did not fairly present this argument to the state courts.

As discussed above, in order to satisfy the exhaustion requirement, a petitioner must fairly present his federal claim to the state courts or have no remaining state remedies available. 28 U.S.C. § 2254(b) and (c); *Franklin*, 811 F.2d at 325. However, the United States Supreme Court has held that a petitioner procedurally defaults a claim for purposes of federal habeas review if he fails "to exhaust state remedies and the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred." *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991). In other words, a petitioner procedurally defaults a claim when he fails to exhaust all available state remedies with respect to said claim, and the state court to which he would be required to present the claim to would now find that the claim is procedurally barred. *Id*; *Mikesell v. Conley*, 51 Fed. Appx. 496, 505-06 (6th Cir October 21, 2002). Thus, when a petitioner fails to fully and fairly present his claims to the state courts before the time for him to do so has expired, he procedurally defaults and is foreclosed from federal habeas corpus review of those claims, absent a showing of cause and prejudice or a fundamental miscarriage of justice. *In re Cook*, 215 F.3d 606, 608 (6th Cir 2000).

In the case at bar, the undersigned notes that although Petitioner did mention in minimal passing the Fifth, Sixth, and Fourteenth Amendments in both his appeal to the Ninth District Court of Appeals and his memorandum in support of

jurisdiction to the Ohio Supreme Court, he never raised the claim that the admission of this testimony of Lonn Stuart regarding the contents of the letter was fundamentally unfair, in violation of his federal due process rights. Rather, from the outset, Petitioner simply argued that the trial court misapplied Ohio evidentiary law. Consequently, the Ohio courts rendered their opinions based solely on Ohio law and did not discuss any federal due process violation. Therefore, the undersigned finds that Petitioner failed to fairly present his federal due process argument to the Ohio courts and in doing so, deprived the state courts of the opportunity to resolve the federal constitutional claim contained therein.

However, even though Petitioner failed to present this federal claim to the Ohio courts, it appears that Petitioner has no state remedies remaining in which he could raise the federal claim because the time limitations in which to file a petition for state post-conviction relief under Ohio Revised Code § 2953.21 (A)(2) and Ohio Revised Code § 2953.23(A) have long since expired. In addition, Petitioner has set forth no facts pursuant to Ohio Revised Code § 2953.23(A) that would allow him to file a state post-conviction petition outside the applicable time limitations. Thus, it appears as if Petitioner has technically exhausted his state remedies with regard to this claim because there are no available remedies for the petitioner to pursue in the state courts. Accordingly, the undersigned finds that Petitioner has exhausted his state remedies with regard to this claim.

Nevertheless, this Court's inquiry does not end with the finding that Petitioner has exhausted his state remedies. Instead, Petitioner must still satisfy the procedural default requirements before this Court can reviews the merits of Petitioner's federal due process claim. As discussed above, a petitioner procedurally defaults a claim when he fails to exhaust all available state remedies with respect to the claim, and the state court to which he would be required to present the claim to would now find that the claim is procedurally barred. *In re Cook*, 215 F.3d at 608. Here, Petitioner failed to fully and fairly present his federal due process claim to the state courts before the time limit for him to do so expired. Accordingly, the undersigned finds that Petitioner has procedurally defaulted his federal due process claim. Thus, Petitioner is foreclosed from federal habeas corpus review of this claim.

Furthermore, Petitioner has not shown cause for, or prejudice resulting from, his failure to present the federal due process challenge to the state courts, nor does he demonstrate that failure to consider this claim will result in a fundamental miscarriage of justice. Accordingly, the undersigned recommends that this Court dismiss Petitioner's first ground for relief to the extent that it raises for the first time a claim that the admission of the testimony was fundamentally unfair, in violation of federal due process because Petitioner has procedurally defaulted said claim.

B. PETITIONER'S SECOND GROUND FOR RELIEF

In his second ground for relief, Petitioner claims that the trial court erred in allowing the out-of-court statements of the victim, a five-year-old child, to be introduced at trial through the testimony of other witnesses. Before the trial, the state of Ohio filed a notice of its intention to use the victim's out-of-court statement at trial pursuant to Rule 807 of the Ohio Rules of Evidence. Rule 807 sets forth an exception to the hearsay rule that allows, under certain circumstances, the out-of-court statements made by a child, who is under twelve years of age at the time of trial, describing any sexual act performed by, with, or on the child. OHIO R. EVIDENCE 807(a).

On February 17, 2000, the trial court conducted an evidentiary hearing pursuant to Rule 803 of the Ohio Rules of Evidence in order to determine if the victim was competent to testify at trial, and if so, if the victim was available to testify at trial. At the hearing, the trial court and the prosecuting attorney examined the victim. Hearing Transcript, ECF Dkt. #4. In addition, defense counsel cross-examined the victim. *Id.* at 17.

On March 21, 2000, the trial court issued an order, in which it concluded that the victim was competent to testify. ECF Dkt. #8. Then, the trial court considered whether the victim was available to testify at the trial pursuant to Rule 807

ofthe Ohio Rules of Evidence. *Id.* The trial court noted that the victim initially responded well to neutral, non-emotional questions unrelated to sexual activity. ECF Dkt. #8, at 2. However, the court noted that when the victim was asked about matters or details of a sexual nature, he became sullen, fidgety, unresponsive and was hiding his face. The court also stated that any response by the victim was negativistic, and he always responded "no" if pressed, encouraged or cajoled to respond. Thus, the trial court concluded that the victim was not, would not, and could not be coaxed, pressured, or cajoled into answering questions in the sexual area and relative to Petitioner. *Id.* The trial court also opined that it was clear that although the victim was physically present and competent to testify, he was unavailable to testify relative to any substantive matters and issues before the court. *Id.* at 3. Based on these findings, the trial court concluded that the victim was not reasonably available to testify at Petitioner's trial. *Id.* The trial court then considered the elements of Rule 807 with regard to whether the victim's out-of-court statements were admissible and concluded that the statements were indeed admissible. *Id.* at 5-6.

In his memorandum in support of his petition for habeas corpus, Petitioner alleges that the trial court erred in admitting the out-of-court statements of the victim. Specifically, Petitioner alleges that the trial court improperly concluded under Rule 807 oftheOhio Rules of Evidence that the victim was unavailable to testify. Indeed, Petitioner claims

that the victim's statements did not contain a guarantee of trustworthiness, did not set forth a specific time frame, were not offered spontaneously, and were not reasonably obtainable. Petitioner also argues that there was no independent proof of the alleged sexual acts committed by Petitioner.

Conversely, Respondent argues that Petitioner's claims regarding the trial court's determination that the victim was unavailable to testify pursuant to Rule 807 of the Ohio Rules of Evidence are not cognizable on federal habeas review. As discussed in the preceding section, errors in the application of state law, especially with regard to the admissibility of evidence, are usually not cognizable in federal habeas corpus. *Walker*, 703 F.2d at 962. Petitioner's contentions that the state courts misapplied Rule 807 and erroneously declared the victim was unavailable to testify solely challenge the state courts' application of state law. Such challenges are not cognizable in a federal habeas corpus proceeding. Further, Petitioner makes no argument, nor has he ever argued, that the admission of the out-of-court statements was fundamentally unfair, in violation of Petitioner's federal due process rights. Thus, the undersigned recommends that this Court overrule Petitioner's second ground for relief to the extent that Petitioner challenges the state courts' application of Rule 807 of the Federal Rules of Civil Procedure.

In addition, in his memorandum in support of his petition for habeas corpus, Petitioner states in conclusory fashion that the admission of the out-of-court statements of the victim violated his right to due process and his right to confrontation as set forth in the United States Constitution. However, Petitioner does not explain how these rights were violated. In his traverse, Petitioner specifically discusses for the first time how his right to confrontation was violated, but again fails to discuss how his federal due process rights were violated.

In response, Respondent argues that Petitioner has failed to exhaust his state remedies with regard to these two federal claims because he has failed to fairly present these claims to the Ohio courts.

The undersigned notes that Petitioner did mention in minimal passing that the admission of the out-of-court statements violated his right to due process and right to confrontation in both his appeal to the Ninth District Court of Appeals and his memorandum in support of jurisdiction to the Ohio Supreme Court. ECF Dkt. # 17, at 14, 17; ECF Dkt. #21, at 8, 10 Aside from these generalized, conclusory remarks, however, Petitioner did not discuss the substantive law regarding these federal claims in any state court proceeding, or rely upon any federal or state cases employing federal constitutional analysis. Rather, from the outset, Petitioner simply alleged that trial court misapplied Ohio evidentiary law in determining that the victim was unavailable

to testify, and admitting the out-of-court statements at trial. Consequently, the Ohio courts rendered their opinions based solely on Ohio law and did not discuss any federal claims. Therefore, the undersigned finds that Petitioner failed to fairly present the two federal claims contained in his second ground for relief to the state courts.

However, even though Petitioner has failed to present these federal claims to the Ohio courts, it appears that Petitioner has no available state remedies in which he could raise the federal claims because the time limitations in which to file a petition for state post-conviction relief under Ohio Revised Code § 2953.21(A)(2) and Ohio Revised Code § 2953.23(A) have long since expired. Moreover, Petitioner has set forth no facts pursuant to Ohio Revised Code § 2953.23(A) that would allow him to file a state post-conviction petition outside the applicable time limitations. Thus, it appears as if Petitioner has technically exhausted his state remedies with regard to his federal due process claim and his federal right to confrontation claim because there are no available remedies for the petitioner to pursue in the state courts. Accordingly, the undersigned finds that Petitioner has exhausted his state remedies with regard to these two federal claims.

As discussed in the preceding section, this Court's inquiry does not end with the finding that Petitioner has exhausted his state remedies. Petitioner must still satisfy the procedural default requirements before this Court can reviews

the merits of the two federal claims asserted in his second ground for relief A petitioner procedurally defaults a claim when he fails to exhaust all available state remedies with respect to the claim, and the state court to which he would be required to present the claim to would now find that the claim is procedurally barred. *In re Cook*, 215 F.3d at 608. Here, Petitioner failed to fully and fairly present his federal claims to the state courts before the time limit for him to do so expired. Accordingly, the undersigned finds that Petitioner has procedurally defaulted his federal due process claim and his federal claim under the confrontation clause, and is now foreclosed from federal habeas corpus review of these claims.

Furthermore, Petitioner has not shown cause for, or prejudice resulting from, his failure to present the above-mentioned federal claims to the state courts, nor does he demonstrate that failure to consider these claims will result in a fundamental miscarriage of justice. Accordingly, the undersigned recommends that this Court dismiss Petitioner's second ground for relief to the extent that it raises for the first time that the admission of the out-of-court statements of the victim violated his federal constitutional rights of due process and to confront the witness against him because Petitioner has procedurally defaulted such claims.

C. PETITIONER'S THIRD GROUND FOR RELIEF

In his third ground for relief, Petitioner argues that the trial court committed prejudicial error by allowing into evidence a stick-figure drawing of a sexual nature that was found in Petitioner's bedroom. ECF Dkt. #22, at 11. Over the objection of Petitioner, the trial court allowed the state of Ohio to submit as evidence a drawing that depicted two male figures, one larger than the other, involving a penis and testicles. Petitioner avers that there was no evidence that the drawing was made by Petitioner, that the drawing was not relevant, and that the admission of this exhibit unfairly prejudiced him and denied him his rights as guaranteed by the United States Constitution.

As discussed in the preceding sections, errors in application of state law, especially with regard to the admissibility of evidence, are usually not cognizable in federal habeas corpus. *Walker*, 703 F.2d at 962. However, when an evidentiary ruling is so egregious that it results in a denial of fundamental fairness, it may violate due process and thus warrant habeas relief. *Coleman*, 244 F.3d at 542.

In light of the foregoing, the undersigned finds that the claims that the drawing was improperly admitted into evidence are not cognizable on federal habeas review because such claims are based solely on the application of the Ohio Rules of Evidence. Accordingly, such challenges are not

cognizable in a federal habeas corpus proceeding. Therefore, the undersigned recommends that this Court overrule Petitioner's third ground for relief to the extent that Petitioner challenges the state courts' application of state law with regard to the admission of the drawing into evidence.

Moreover, in his traverse, Petitioner argues for the first time that the admission of the drawing was fundamentally unfair, in violation of Petitioner's federal due process rights. ECF Dkt. #28, at 14. Petitioner argues that there was no physical evidence of any rape or gross sexual imposition presented at trial, and that the admission of the drawing, which was of a sexual nature, rendered the trial fundamentally unfair.

Respondent concedes that Petitioner's fundamental fairness claim is cognizable on federal habeas review because it implicates federal due process. However, Respondent argues that Petitioner has failed to exhaust his state remedies with respect to this argument because he did not fairly present it to the state courts.

Upon review of the record, the undersigned notes that in his appeal to the Ninth District Court of Appeals, Petitioner does mention in the caption of his Fifth Assignment of Error that the admission of the drawing violated his rights as guaranteed to him by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. But, Petitioner does not discuss which right or rights were violated. Moreover, in his memorandum in support of

jurisdiction to the Ohio Supreme Court, Petitioner discusses that the evidence was improperly admitted solely under Ohio law and he does not even mention that the admission of this evidence violated his federal constitutional rights. ECF Dkt. #21, at 11. Therefore, the undersigned finds that Petitioner failed to fairly present his federal due process argument to the Ohio courts.

However, even though Petitioner failed to present his federal due process claim to the Ohio courts, it appears that Petitioner has no state remedies remaining in which lie could raise the federal claim because the time limitations in which to file a petition for state post-conviction relief under Ohio Revised Code § 2953.21(A)(2) and Ohio Revised Code § 2953.23(A) have long since expired. Moreover, Petitioner has set forth no facts pursuant to Ohio Revised Code § 2953.23(A) that would allow him to file a state post-conviction petition outside the applicable time limitations. Thus, it appears as if Petitioner has technically exhausted his state remedies with regard to this claim because there are no available state remedies for the petitioner to pursue. Accordingly, the undersigned finds that Petitioner has exhausted his state remedies with regard to his federal due process claim.

This Court's inquiry does not end with the finding that Petitioner has exhausted his state remedies. Instead, Petitioner must still satisfy the procedural default requirements before this Court can reviews the merits of Petitioner's federal due

process claim. Again, the undersigned finds that Petitioner has procedurally defaulted this claim because he failed to fully and fairly present this claim to the state courts before the time for him to do so expired. *In re Cook*, 215 F.3d at 608. Accordingly, Petitioner is foreclosed from federal habeas corpus review of this claim.

Furthermore, Petitioner has not shown cause for, or prejudice resulting from, his failure to present the federal due process challenge to the state courts, nor does he demonstrate that failure to consider this claim will result in a fundamental miscarriage of justice. Accordingly, the undersigned recommends that this Court dismiss Petitioner's first ground for relief to the extent that it raises for the first time a claim that the admission of the testimony was fundamentally unfair, in violation of federal due process.

D. PETITIONER'S FOURTH GROUND FOR RELIEF

In his fourth ground for relief, Petitioner argues that his conviction on each count was against the manifest weight of the evidence. However, Petitioner subsequently abandoned his weight of the evidence claim in light of the fact that a federal habeas court has no power to grant habeas relief on the ground that a state conviction is against the weight of the evidence. ECF Dkt. #28, at 15; *see Walker v. Engle*, 703 F.2d 959, 969 (6th Cir. 1983)(*citing Pigford v. United States*, 518

Fold 831, 836 (4th Cir. 1975). Based on the foregoing, the undersigned recommends that this Court overrule Petitioner's fourth ground for relief.

E. PETITIONER'S FIFTH GROUND FOR RELIEF

In his fifth ground for relief, Petitioner argues that his conviction was based upon insufficient evidence, and therefore violated his federal due process rights. ECF Dkt. #22, at 13. Specifically, Petitioner alleges that the state failed to present any physical evidence linking Petitioner to the alleged crimes or any independent eyewitness testimony. *Id.* In addition, Petitioner did not confess to the crimes. *Id.* Petitioner further alleges that the evidence the state did produce, such as the testimony of the father of the victim regarding the contents of the letter, the stick-figure drawing, and the hearsay testimony of several witnesses, were all insufficient to support the convictions of rape and gross sexual imposition. *Id.*

In *Jackson v. Virginia*, 443 U.S. 307 (1979), the United States Supreme Court set forth the standard for deciding whether evidence is constitutionally insufficient to sustain convictions. The inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id.* at 319.

Circumstantial evidence may be sufficient to support a conviction. *United States v. Stone*, 748 F.2d 361, 363 (6th Cir.1984). Finally, it is well established that the trier of fact at the state court level bears primary responsibility to choose which testimony or evidence to believe, and that a credibility determination by a state court is entitled to a presumption of correctness so long as the determination is fairly supported by the record. *Walker v. Engle*, 703 F.2d 959, 969-70 (6th Cir. 1983); 28 U.S.C. § 2254(d).

After reviewing the record, weighing the evidence and all reasonable inferences, taking into consideration the testimony of the witnesses regarding the victim's disclosure of the two instances of rape, the corroborating evidence such as the contents of the letter and the stick-figure drawing, and the jury's determination of the credibility of the police and lay witnesses, the Court finds that viewing the evidence in the light most favorable to the government, a rational trier of fact could have found beyond a reasonable doubt that Petitioner committed rape and gross sexual imposition.

Finally, Petitioner has failed to establish that the state court analysis of his insufficient evidence claim was contrary to, or an unreasonable application of, federal law. The Ninth District Court of appeals correctly applied the *Jackson v. Virginia* standard as discussed above. ECF Dkt. #19, at 3-4 (the Ninth District Court of Appeals applied *State v. Jenks*, 61 Ohio St.3d 259 (1991), in which the Ohio Supreme Court applied the *Jackson v. Virginia* standard of review to

sufficiency of evidence claims). Thus, the undersigned finds that Petitioner's fifth ground for relief is without merit. Accordingly, the undersigned recommends that this Court overrule Petitioner's fifth ground for relief.

III. CONCLUSION AND RECOMMENDATION

For the foregoing reasons, the undersigned finds that Petitioner's five grounds for relief are without merit. Accordingly, the undersigned recommends that this Court dismiss the instant petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 with prejudice.

Date: March 12, 2004

/s/ George J. Limbert
GEORGE J. LIMBERT
United States Magistrate Judge

ANY OBJECTIONS to this Report and Recommendation must be filed with the Clerk of Court within ten (10) days of service of this notice. Failure to file objections within the specified time WAIVES the right to appeal the Magistrate Judge's recommendation. *See Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).